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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

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10 RUDOLPH PERRY,
11 Petitioner,

12 v.
13 PIERCE COUNTY SUPERIOR COURT,

14 Respondent.

15 Case No. C05-5301RJB

16 REPORT AND
17 RECOMMENDATION

18 **NOTED FOR:
19 JULY 8th, 2005**

20 INTRODUCTION AND SUMMARY CONCLUSION

21 This 28 U.S.C. § 2254 petition for habeas corpus relief has been referred to the undersigned
22 Magistrate Judge pursuant to 28 U.S.C. § 636 (b) and local Rules MJR 3 and 4. In reviewing the
23 petition prior to service the court noted that petitioner had failed to allege facts showing exhaustion
24 and failed to name a proper respondent. The court entered an Order to Show Cause. (Dkt. # 5).
25 Petitioner's response to the order shows the issues raised in this petition to be unexhausted.
26 Accordingly the undersigned recommends this petition be **DISMISSED WITHOUT PREJUDICE**.

27 FACTS

28 Petitioner challenges a Pierce County conviction. He is currently housed at the county jail.
29 In response to an Order to Show Cause he indicates he sought review of the conviction in superior
30 court and that he has filed a personal restraint petition in the Washington State Court of Appeals.
31 (Dkt. # 6). The response shows no issue raised in this petition has been exhausted.

32 DISCUSSION

1 Exhaustion of State Remedies.

2 In order to satisfy the exhaustion requirement, petitioner's claims must have been fairly
 3 presented to the state's highest court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
 4 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985). No claim in this petition was presented to Washington
 5 State's highest court as a violation of a federal Constitutional right. A federal habeas petitioner must
 6 provide the state courts with a fair opportunity to correct alleged violations of prisoners' federal
 7 rights. Duncan v. Henry, 513 U.S.364, 115 S.Ct. 887, 888 (1995). It is not enough that all the facts
 8 necessary to support the federal claim were before the state courts or that a somewhat similar state
 9 law claim was made. Id, *citing* Picard v. Connor, 404 U.S. 270 (1971) and Anderson v. Harless, 459
 10 U.S. 4 (1982). No claim in this petition was presented to the state supreme court as a federal claim.
 11 Thus, the claims in this petition are unexhausted. A federal court faced with an unexhausted petition
 12 dismisses the petition, without prejudice, so that the petitioner has an opportunity to exhaust the
 13 claims in state court. Rose v. Lundy, 455 U.S. 509, 522 (1982). Petitioner should be given that
 14 opportunity.

15 CONCLUSION

16 Based on the foregoing discussion, the Court should **DISMISS** the petition **WITHOUT**
 17 **PREJUDICE**. A proposed order accompanies this report and recommendation.

18 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the
 19 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.
 20 R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of
 21 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule
 22 72(b), the clerk is directed to set the matter for consideration on **July 8th 2005**, as noted in the
 23 caption.

24 DATED this 10th day of June, 2005.



25 Karen L. Strombom
 26 United States Magistrate Judge